IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

PURPLE INNOVATION, a Delaware limited liability company, Plaintiff, vs. RESPONSIVE SURFACE TECHNOLOGY, a Delaware limited liability company, et al., Defendants.	)	Case No: 2:20cv709RJS

BEFORE THE HONORABLE ROBERT J. SHELBY

August 31, 2021

ZOOM ORAL RULING HEARING

Reported by:
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SALT LAKE CITY, UTAH, TUESDAY, AUGUST 31, 2021

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THE COURT: We'll go ahead and call Case Number 2:20-CV-708. It's our Purple Innovation vs. ReST and others case. Counsel, let me invite you to take a moment and make your appearances, if you would, please. For the plaintiff?

MR. MAGLEBY: Your Honor, Jim Magleby and Adam Alba on behalf of the plaintiff Purple. And we have client representatives James Larson and Craig Kleinman observing.

THE COURT: Thank you.

MR. FOWLER: Your Honor, this is Tracy Fowler with Snell and Wilmer. I'm appearing for the Patientech, ReST and Golden defendants. And Mr. Golden is also in attendance today.

THE COURT: Okay. Thank you. All right. At the outset, let me just say as I often before an oral ruling, I won't ask either of you to prepare and submit a draft order. We will place on the docket a minute entry in the next few days referencing the transcript of this hearing as the Court's ruling on the motion to compel arbitration and stay proceedings, Docket 111. So you can rest your hands, and I think I always endeavor to be reasonably complete even in our oral rulings. And so I'll just tell you in advance this is a 30-page ruling that I'm about to read to you. It's going to

take a little while. Relax, get lots of water and some snacks, and I'll be happy to answer any questions you may have at the end.

[redacted]

and infringement of the intellectual property rights. Purple Innovation brings this action against defendants Responsive Surface Technology, LLC, that we've all been calling ReST, PatientTech and Robert Golden. One week after filing this lawsuit Purple [redacted]

After mediation discussion broke down. The defendants then [redacted] Purple refused to arbitrate arguing that the defendants had waived their right by engaging in litigation conduct. And now before the Court, as I said, after having received oral argument, after the motion was completely briefed is the motion to compel arbitration and stay proceedings, Docket 111, filed by the defendants.

The central issue presented to the Court is whether the defendants are entitled [redacted]

The court held a Zoom hearing on the motion on May 25 this year, Jim Magleby appearing for Purple and Tracy Fowler

appearing for the defendants. And at the end of that hearing I took the motion under advisement. As I said at the outset, we noticed this hearing for the purpose of providing you an oral ruling on the defendant's motion, and for the reasons I'm about to explain defendant's motion will be granted.

First the background. And the facts I'm about to relate are drawn from the parties' briefing on the motion and they're supplemented, the facts are, by Purple's Consolidated First Amended Complaint, Docket 129; defendants' corresponding Answer, Counterclaims and Third-Party Claims, Docket 142. And I'll just note that all of the docket numbers correspond to the sealed un-redacted versions of the filings.

I'll also note that my analysis, I'm required in my analysis to consider the timing, sequence and nature of the parties' litigation conduct prior to the time that the defendants invoked the right to arbitration. And for this reason I'm about to relate in some detail the factual and procedural record of the case paying particular attention to which party acted and when.

Beginning in late 2019, [redacted] And let me just note here at the outset, the defendants filed their answer to

the Consolidated First Amended Complaint Counterclaims and Third-Party Claims, that's a document, that's the name of it, on February 26th, 2012. It's Docket 142. The counterclaims are filed in the same document as the answer and defenses, and paragraphs from each section are numbered separately all beginning with Paragraph 1 in each section. In other words, the document has three separate paragraphs bearing the number of Paragraph 1.

For clarity, throughout my oral ruling, I will cite to the portion of the filing that is at issue. For example, I'll refer to the answer portion of that document as the answer at Paragraph X. The counterclaim as the counterclaim Paragraph X and the like, even though they're both part of the same document, Document 142.

In January 2020 ReST and PatientTech [redacted] pertains to alternative dispute resolution and contains an arbitration provision. I'm reading here [redacted] It's Docket Number 19-1.

In relevant part [redacted]

[redacted]

On June 30, 2020, the parties entered into an additional agreement known as the Ad Spend Agreement. And the defendants allege that the parties later entered into a third verbal agreement that the defendants called a Supply Agreement.

With respect [redacted] plaintiffs allege defendants began [redacted] I'm citing here to the complaint at Paragraph 7. I guess I should have said Supply Agreement and its references the allegations about that are found in the counterclaim of Paragraph 8. And I think I misstated it. I think the defendants contend and maintain that the Supply Agreement was entered into around about the same time as the Ad Spend Agreement. On October 13, 2020, Purple filed suit against ReST and PatientTech for [redacted] and infringement of its intellectual property rights.

And I will refer to that complaint and that action throughout this oral ruling as Purple I. And I'm citing here to Docket 1, the original complaint, and Docket 111, the defendants' motion to compel arbitration.

Purple later amended its complaint to add Robert Golden, cofounder and CEO of PatientTech and CEO of ReST, as an additional defendant. That's Docket 117.

On October 20, one week after filing its initial complaint, ReST -- excuse me -- Purple [redacted] I'm citing here the motion to compel, Paragraph 4. The next day, ReST filed a separate complaint, a separate lawsuit that I'll refer to as Purple II, naming as defendants Purple and several other board members and officers [redacted] I'm citing here the opposition to the motion at Paragraph 6; also Docket 157, the defendants' reply memorandum, at Paragraph 2.

In Purple II, ReST alleged that Purple breached the Ad Spend Agreement and the Oral Supply Agreement. Notably ReST [redacted]

After receiving Purple's demand for mediation in Purple I, the defendants agreed to mediate Purple's claims [redacted] and negotiations began. I'm citing here Paragraph 5 of the motion. Over the next month or so, the parties corresponded regarding the proposed mediation. Much of this is set out in the motion at Paragraph 5 and Docket 139, the opposition, in Paragraphs 8 through 10. Mediation discussions continued until Purple failed to respond to a November 17, 2020, e-mail from defendants concerning the

location and cost arrangements for the mediation. Citing the motion at Paragraph 5, the opposition, Paragraphs 10 and 14. And I'll note that we have the correspondence that you've all submitted helpfully at Docket 111-4 Exhibit A to the declaration of counsel. That's the e-mail.

On November 20, 2020, Purple moved to consolidate Purple II into this action, Purple I. I granted that motion by order dated January 22nd, 2021. It's Docket 114. Excuse me. That's the motion. My order is Docket 120. [redacted] Again, the order at Docket 120. I'm reading here from Page 5.

Between November 23rd and December 23rd, of 2020 while Purple's motion to consolidate was pending Purple filed a number of other motions. On November 23rd, Purple filed a motion for temporary restraining order against the defendants, which I later granted in part. That's Docket 16 is the motion, Docket 63, my order.

On December 2nd, Purple filed a motion to dismiss certain of the claims in Purple II. That's Docket Number 41 in the other case. On December 21st, Purple filed a motion for leave to amend its complaint at which the defendants did not oppose. That's motion Docket 76. And on December 23rd,

Purple filed a motion for order to show cause related to defendants' conduct respecting the temporary restraining order that I entered. That motion, Docket 77.

On multiple occasions while responding to Purple's motions, defendants raised the arbitrability of the Purple I claims [redacted] And that's set out in the reply memorandum in Paragraphs 14 through 17.

Finally, during a hearing on January 6 of this year, defendants notified Purple that more than 60 days had now passed without reaching a settlement through mediation and [redacted] I'm citing here the motion at Paragraph 6 and the opposition Paragraphs 43 and 44.

Purple responded six days later on January 12 arguing that the defendants had waived their right to arbitration by among other things filing the Purple II action. And this is described in Docket 111-5, which are the January e-mails; the motion at Paragraph 7 and the opposition, Paragraph 45.

In addition, Purple argued that to the extent that the Purple I claims were subject to arbitration, the Purple II claims must now also be arbitrated, as well. That's also set out in the January e-mails, Docket 111-5. Based on Purple's refusal to submit to arbitration defendants filed the instant motion on May 25. As I said, this year we received oral

argument from the parties and I took the motion under advisement.

Turning to the Court's analysis, the parties here do not dispute the existence or validity [redacted] Defendants further argue judicial proceedings including trial should be stayed and in resolution of arbitration. Purple opposes the motion insisting that the defendants have [redacted] by manipulating the judicial process and engaging in litigation conduct.

I will begin as always by focusing first on the applicable legal standard that governs waiver to the right to arbitration and then turn to Purple's arguments in favor of waiver beginning with the legal standard.

Waiver by litigation conduct is presumptively for the court to decide. I'm citing here Born vs. Progrexion Teleservices, one of my earlier decisions, 2020 Westlaw 4674236. Courts in the 10th Circuit employ a six-factor test called the Peterson test or Peterson factors to determine whether a right to arbitration has been waived. I'm citing here the 10th Circuit decision In Re: Cox Enterprises from

2015.

Those factors are these: First, whether the party's actions are inconsistent with the right to arbitrate; second, whether the litigation machinery has been substantially invoked and the parties were well into preparation of a lawsuit before the party notified the opposing party of an intent to arbitrate; third, whether a party either requesting arbitration enforcement close to -- either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; fourth, whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; fifth, whether important intervening steps, for example, taking advantage of judicial discovery procedures not available in arbitration, had taken place; and finally, whether the delay affected, misled or prejudiced the opposing party. That's all in Peterson vs. Shearson/American Express, a 1988 decision from the 10th Circuit.

In evaluating those factors, the 10th Circuit has instructed that I am not to employ a mechanical process in which each factor is assessed and can decide the greater number of the favorable factors prevail. That was explained in In Re: Cox, Page 1116. I am instead told that these factors reflect certain principles that should guide courts in determining whether a party has waived its right to

arbitration. Here I'm citing Hill vs. Ricoh Americas Corp., from the 10th Circuit 2010.

And the 10th Circuit has further stated that an important consideration in assessing waiver is whether the party now seeking arbitration is improperly manipulating the judicial process. That's In Re: Cox, Page 1116. An important consideration is maintenance of the combined efficiency of the public and private dispute resolution systems. That's from Hill at Page 774.

Here, it is Purple that bears the burden of persuasion as it is the party claiming that the right to demand arbitration has been waived. Hill set out the standard for the burden at Page 775. In assessing whether that burden has been satisfied I'm required to give substantial weight to the strong federal policy encouraging the expeditious and inexpensive resolution of disputes through arbitration. That's a quote from Hill, Page 775.

For the reasons that I'm going to -- now about to explain, I find that Purple's arguments are insufficient to establish waiver.

I find the background in this case to be significant in considering Purple's arguments in a proper light. Therefore, before engaging in a detailed analysis, I will first review the parties' conduct and discuss Purple's waiver arguments at a more general level to place them in the

appropriate factual context. And then I will proceed to apply the specific Peterson factors from the 10th Circuit. So more generally.

Immediately after filing this lawsuit Purple invoked by reference [redacted] I'm citing here the motion at Page 4. As I've already stated that provision includes the 60-day mediation period followed by mandatory arbitration of any resolve, controversy or claim. [redacted] Defendants agreed mediation was appropriate, and the parties engaged in preliminary negotiations.

Just weeks later Purple failed to respond to defendants' communication concerning mediation arrangements, citing Motion 5, at 5 in the opposition at Paragraphs 10 and 14. Purple then proceeded to file multiple motions with the court before the 60-day mediation period had concluded including a motion seeking a temporary restraining order against the defendants. I'm citing here from the opposition in Paragraphs 16, 20, 31 and 34 and the reply in Paragraph 11. The defendants were required to oppose this and other motions in order to avoid waiving their important rights. 20 days after the mediation period expired, the defendants sought arbitration pursuant to the same arbitration -- excuse me -- alternative dispute resolution provision that Purple first invoked. I'm citing the motion at Paragraph 6 and 10, the

Opposition, Paragraphs 43 and 44.

[redacted] I'm citing the opposition at Page 4 and Pages 19 and 20. And more specifically, Purple argues defendants are barred from invoking the arbitration clause of [redacted] they responded to Purple's various motions and complied with several court orders. This is set out in the opposition, Purple's opposition at Pages 16 through 19.

Purple further argues defendants unjustifiably delayed seeking arbitration even though they were required to wait 60 days before doing so, and Purple's only filings required extensive motion practice before and after the mediation period had expired. I'm citing the opposition at Pages 19 and 20.

Finally Purple argues defendants waived the right to seek arbitration because they did so after filing a separate lawsuit. But I will observe that Purple itself [redacted]

With the benefit of oral argument, it appears Purple's position can be summarized into two general contentions. First, that the defendants invoked a litigation machinery by filing Purple II and by participating in the

litigation of Purple I rather than filing a motion to stay in Purple I at the earliest possible time; and second, that defendants should have pursued the Purple II claims as a counterclaim in Purple I and that filing those claims separately as Purple II in the standalone lawsuit was tantamount to improper manipulation of the judicial process.

I will briefly explain now in general terms why I conclude that both of those arguments fail and then turn to the Peterson facts.

First, as I will discuss in a moment, all of the defendants' litigation conduct identified by Purple with the exception of filing Purple II was in response to Purple's various motions. Thus, it was Purple and not the defendants that invoked the litigation machinery in Purple I. Defendants were constrained by court orders and the Federal Rules of Civil Procedure to respond to Purple's motions or otherwise risk losing important legal rights.

Purple argues defendants could have prevented all of this by filing a motion to stay at the very beginning of the lawsuit. But as defendants explained in oral argument and implied in their briefs they had no reason to believe that a stay was necessary because Purple immediately invoked the 60-day mediation period and then entered into good faith mediation discussions with the defendants.

Second, Purple's arguments with respect to the

Purple II filing require me to make presumptions in its favor where it has not carried the burden of persuasion. Purple's argument that filing Purple II constitutes an invocation of litigation machinery with respect to the claims in Purple I requires me to assume that the defendants could have brought the Purple II claims in arbitration. But Purple has failed to establish this through legal argument or analysis. [redacted]

Similarly, Purple's argument that the Purple II claims should have been filed as counterclaims in Purple I requires me to assume that the Purple II claims were compulsory or otherwise required to be filed in Purple I, and this would itself require an analysis of how to treat separate but related contracts between related parties under Utah law. And again, Purple has failed to invoke this analysis in its papers. Thus, at a general's level I find Purple's arguments are unavailing.

With that contextual backdrop I'll now analyze Purple's arguments more specifically under the Peterson factors and the 10th Circuit standard. I'll take up first -- well, Purple first argues that the Peterson factors compel a finding of waiver. Purple supports this argument with a list with purported litigation conduct by the defendants. And as I

said, that's found in their opposition brief Pages 16 through 19. This list includes actions taken both in the instant case and in Purple II. The conduct at issue in Purple I includes submitting an answer to Purple's complaint; refusing Purple's request to consolidate Purple I and Purple II; opposing Purple's motion to consolidate; opposing Purple's motion for a TRO; attending a hearing on November 25th, 2020, that was our TRO status and scheduling conference the night before Thanksgiving; attending a hearing on December 11th, 2020, which was the TRO hearing; and working with Purple to schedule, prepare a schedule, rather, for Purple I; oh, also filing a joint notice of preliminary injunction and not filing an opposition to Purple's motion for leave to amend.

And I'll just say here briefly that it's curious that Purple -- that the defendant -- Purple argues that the defendants invoked the litigation machinery both by in different instances opposing Purple's motions and in other instances by failing to oppose Purple's motions.

Purple also complains that the defendants filed a response to Purple's motion for an order to show cause and then attended a hearing on that motion on January 6th of this year. Purple complains that the defendants requested additional time to file a response to Purple's first amended complaint and refused to attempt to mediate the case in Utah as requested by Purple.

The specific conduct at issue in Purple II about which Purple complains is the defendants' filing the lawsuit, the Purple II complaint; working with Purple to create a schedule for Purple II; refusing Purple's request to consolidate Purple I and Purple II; opposing Purple's motion to consolidate; and then serving initial disclosures in Purple II. So with that list in mind now I'll turn to the Peterson factors beginning with the first factor, whether the defendants' actions are inconsistent with the right to arbitrate.

Purple argues defendants' actions that I've just detailed in Purple I and Purple II are inconsistent with the right to arbitrate by appearing willing to litigate this dispute. The argument is laid out on Page 16 of the opposition brief. According to Purple the defendants' willingness to litigate is demonstrated by their consent to jurisdiction and venue, development of a scheduling order, appearances and argument at several hearings, and submission of various filings that I've already recited to the Court.

Defendants disagree contending that aside from the instant motion, that is the motion to compel arbitration, any and all substantive litigation conduct on their part resulted from actions they were required to perform under this court's orders or because filings by Purple triggered mandatory response deadlines under the Federal Rules of Civil Procedure.

This argument is detailed in the reply at Page 4 and again at Page 10.

Defendants argue they took these and other actions such as attending hearings on Purple's various motions simply to protect their rights. This is at the reply Page 5. The defendants further maintain they have acted consistently with the right to arbitrate at all times by including -- excuse me -- including by asserting that right multiple times until the 60-day mediation period expired, and they were permitted finally to request arbitration [redacted] This is the reply Paragraphs 14 through 18 and at Page 10.

And I agree with the defendants. The defendants' actions in this case are not inconsistent with the right to arbitrate. Citing language from the 10th Circuit: A party considering arbitration must do all it could reasonably have been expected to do to make the earliest feasible determination of whether to proceed judicially or by arbitration even if that means just mentioning the prospect of arbitration. That is a quote from Strong vs. Davidson, a 2018 decision from the 10th Circuit. [redacted]

Prior to that time, the most defendants could reasonably do is mention the prospect of arbitration in the

language of the 10th Circuit and reserve their right to invoke arbitration, if necessary at the appropriate time. Again, referring to Strong at Page 682.

And this is exactly what defendants did. Specifically defendants raised the right to arbitration of Purple's claims in their answer to Purple's amended complaint, in their opposition to Purple's motion to consolidate and at the January 6, 2021, hearing on Purple's motion for an order to show cause. This is all detailed in the reply memoranda at Paragraphs 14 through 18. Still Purple argues defendants should have filed a motion to stay earlier in the case.

But the fact that the defendants did not immediately file a motion to stay is not itself inconsistent with pursuing its right to arbitrate, especially when the parties agreed to mediate and negotiations were already underway.

As to the mediation Purple argues defendants acted inconsistently with the right to arbitrate by imposing numerous hindrances on the mediation process. That argument found on Page 16 of the opposition. I find it unpersuasive.

[redacted] That is where the parties were unable to resolve their differences through mediation.

Moreover, Purple imposed its own hindrances on the

mediation process. Purple failed to respond to defendants' November 17, 2020, e-mail attempting to negotiate the location and cost arrangements for the mediation. And then Purple proceeded to file four motions over the next month including an application for a temporary restraining order. For these reasons I find defendants have not acted inconsistent with their right to arbitrate and find that this factor weighs against waiver.

Second, I find that defendants have not substantially invoked the litigation machinery or waited until the parties were well into preparation of the lawsuit before notifying Purple of their intent to arbitrate. This is course the Peterson factor Number 2.

Purple points to the previously mentioned list of litigation conduct and argues that defendants have substantially invoked the litigation machinery. This argument is found on Pages 17 and 18 of the opposition. And while I agree that defendants participated in the litigation prior to requesting arbitration I part ways with Purple on the issue of whom was invoking the litigation machinery.

Purple filed four motions in this case and one in Purple II before defendants requested arbitration. Defendants responded to those motions, not to try their luck at litigation before deciding whether or not to arbitrate but merely to preserve their rights and comply with court orders

and applicable rules. This argument is well laid out I think in reply in Pages 4 and 5 and again on Page 10. Indeed, the defendants' first substantive motion filed in either case is this motion, the motion to compel arbitration. I therefore find the defendants did not substantially invoke the litigation machinery.

Moreover, defendants explicitly raised the issue of [redacted] less than two months after the lawsuit was filed. This notice came early in the case before the defendants answer Purple's amended complaint, well before they filed any motions with the Court and before any discovery requests were tendered by the parties. Defendants' request for arbitration came just over one month, I think it's just under one month, after the 60-day mediation period expired.

Further, aside from defendants' affirmatively notifying Purple of their intent to arbitrate, Purple was already on notice pending arbitration from the very beginning of this case, as defendants repeatedly point out. It was in fact Purple that was the first to invoke the arbitration -- excuse me -- [redacted] just one week after filing its own lawsuit. [redacted]

Purple was clearly on notice before any litigation conduct took place by either party that these claims were likely to be arbitrated if the mediation was unsuccessful.

In my judgment, defendants have not substantially invoked the litigation machinery, the parties were not well into preparation of the lawsuit before defendants notified Purple of their intent to arbitrate, and Purple had notice early in the case. And for all of those reasons that factor weighs, that Peterson factor weighs heavily against waiver.

The third Peterson factor asks whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay. And here, of course, no trial date had been set, no discovery had occurred, and defendants did not delay for a long period before seeking a stay. Thus, I find this factor also favors -- excuse me -- weighs against a waiver.

The fourth Peterson factor asks whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings. Defendants moved to stay proceedings on January 19th, 2021. It's Docket 111, in the same motion I think as the motion to consolidate. On February 26th, 2021, defendants filed an answer to Purple's consolidated first amended complaint which included the Purple II claims as counterclaims in this action. It's Docket 142. These counterclaims were filed after defendant sought a stay of the

proceedings. Nevertheless, Purple still argues that this factor supports a finding of waiver. As I previously stated, Purple's argument that defendant should have originally filed the original Purple II claims as counterclaims of Purple I requires me to make legal presumptions in Purple's favor. But it is Purple that bears the burden of persuasion and has not provided supporting arguments or analysis to show that the Purple II claims were compulsory in nature. To the extent that is relevant under this factor I incorporate my earlier discussion here. And now I'll turn to Purple's primary arguments relating to this factor as articulated in its papers.

In Purple's view the filing of Purple II amounts to defendants filing a counterclaim before seeking a stay. This argument is laid out on Page 19 of the opposition memorandum. Specifically Purple argues the allegations and claims in Purple II are substantially similar to the facts and law at issue in this case and the consolidation of Purple I and Purple II makes the Purple II complaint essentially a counterclaim.

Defendants oppose this argument on the grounds that its counterclaims were filed after its motion seeking a stay, and its pre-consolidation position was that the Purple II complaint [redacted]

subject to arbitration unlike the claims in Purple I. All of that is set out in the motion at Page 11. The reply in Paragraphs 3 and 4 and further on Page 11.

Purple provides no authority, and I am not aware of any, for treating defendants' filing of a separate lawsuit as a counterclaim for purposes of assessing waiver under the Peterson factors, especially where the defendants had a good faith basis to believe the secondary lawsuit deals with separate contracts, not subject to the arbitration provisions at issue here. Still as Purple points out, I did find the two cases involve substantially similar allegations and share facts and legal issues sufficient to warrant consolidation.

In addition, the Purple II claims which were later reasserted as counterclaims in defendants' answer were filed nearly three months before defendants moved for a stay. And can given this unique factual scenario, I find Purple's novel argument here warrants some additional analysis, so bear with me.

The 10th Circuit cautions that the Peterson factors are not meant to be applied mechanically, and the list is nonexclusive. Instead, the Peterson factors in the words of the 10th Circuit, quote, reflect certain principles that should guide courts in determining whether it's appropriate to deem that a party has waived its right to demand arbitration. That's a quote from Hill at Page 773. With this in mind I

looked to the underlying principles identified by the 10th Circuit in that case to determine whether defendants' filing of Purple II supports a finding of waiver under the fourth Peterson factor.

In Hill the 10th Circuit articulated several principles the court should consider in resolving the issue of waiver and then went on to identify the Peterson factors that were associated with each principle. For the fourth Peterson factor the 10th Circuit identified an underlying governing principle that, quote: A party should not be permitted to demand arbitration when it has previously waived its right to arbitrate, where a waiver is an intentionally relinquishment or abandonment of a known right. That discussion is on Page 773 of the Hill decision. The court went on to say: A parties' conduct may evince such an intentional relinquishment. Filing a counterclaim without seeking a stay for arbitration is one way that a party can indicate an intentional relinquishment of the right to arbitrate.

Applying that framework here, the question becomes whether filing Purple II indicates defendants' intentional relinquishment of its right to arbitrate. I find that it does not. Despite consolidation, defendants have consistently maintained from the outset that the Purple II claims [redacted] and that the Purple I claims were subject to arbitration where the

Purple II claims were not. This argument is more fully laid out in the reply in Paragraphs 3 and 4 and Pages 10 and 11. It does not follow that the defendants intentionally relinquished [redacted]

Further, even while Purple II is moving forward, defendants repeatedly raised the arbitration for the claims in Purple I. Still the concept of waiver is not limited to intentional relinquishment of a known right, and the 10th Circuit suggests that a party may also relinquish the right negligently. And that is explained also in Hill, Page 773. But here the defendants were not negligent in filing a separate lawsuit where they had a good faith basis to do so, and it was permitted under the rules. For these reasons I conclude that the Purple II filing does not amount to a filing of a counterclaim before seeking a stay for purposes of the fourth Peterson factor.

The fifth Peterson factor asks whether an important intervening -- excuse me -- whether important intervening steps, for example, taking advantage of judicial discovery procedures not available in arbitration had already taken place before a party seeks to enforce arbitration.

Purple argues defendants' actions identified above with respect to Purple I and Purple II, the litigation

conduct, constitutes important intervening steps that reflect defendants' desire to take advantage of the procedures available in litigation rather than arbitration. This is laid out in the opposition at page 19. But as I previously noted, all of defendants' conduct in Purple I was in response to motions filed by Purple or orders issued by the Court. Where defendants took no affirmative action in the case it does not follow that the defendants were attempting to take advantage of litigation procedures not available in arbitration.

Further, this factor is primarily concerned with the substantial use of discovery procedures as explained in Hill, Page 774, which had not occurred in this case or in Purple II before it was consolidated. And for these reasons this factor also weighs heavily against waiver.

The sixth and final Peterson factor asks whether the opposing party was affected, misled or prejudiced by the opposing party's delay in seeking arbitration or a stay of the proceedings.

Purple argues it was misled by defendants' seeming willingness to proceed with litigation, and explains this on Page 20 of its opposition. Purple also argues defendants should have demanded arbitration from the beginning of the lawsuit or filed a motion to stay as discussed previously, thereby preventing waste of time and resources on ancillary issues, such as scheduling orders and appearing at hearings.

Defendants contend Purple has suffered no prejudice as a result of the defendants' actions because, first, [redacted] and knew the claims would go to arbitration after the 60-day period absent successful mediation first; second, Purple was on notice that defendants asserted their claims were subject to arbitration; and third, this case is in its very early stages.

Again I agree with the defendants. Any prejudice to Purple is at most minimal. First, based on the actions identified in Purple's opposition defendants' seeming willingness to proceed with litigation was caused almost entirely by Purple's own motion practice. Second, while Purple has certainly incurred costs thus far in the lawsuit Purple has suffered no prejudice resulting from a delay in defendants seeking arbitration and a stay. Purple filed this action on October 13th last year and almost immediately demanded mediation. [redacted] which means that December 19th of last year was the earliest date defendants could have sought arbitration.

Defendants exercised their right 20 days later on January 8th of this year by formally requesting arbitration of Purple's claims. From the time Purple filed its initial

complaint to the time Purple sought arbitration it was less than three months.

Further, Purple was on notice that defendants would likely request arbitration because Purple first invoked the dispute resolution provision requiring it, and defendants raised the issue at least three times prior to making their formal request. These were detailed in the reply memorandum Paragraphs 14 through 17.

Since defendants did not delay in seeking arbitration and a stay did not mislead Purple as to their intent to do so, Purple suffered no prejudice under this factor and it weighs against waiver.

So having concluded that each Peterson factor weighs against the defendants' waiver of arbitration I'll now turn to Purple's argument that the defendants' actions constitute an improper manipulation of the judicial process. And for the reasons I'm about to explain I conclude that the defendants have not improperly manipulated the judicial process.

Purple argues defendants have improperly manipulated the judicial process by waiting to see how the court would rule on Purple's motion for TRO before deciding to seek arbitration. That argument is laid out on Page 14 of the opposition. And I agree that waiting to see how a case proceeds in district court before deciding to seek arbitration

can be evidence of manipulation of the judicial process. And in Hill, the 10th Circuit said that other signs of manipulation could include using the courts to obtain discovery unavailable in arbitration or delay in suggesting arbitration until substantial discovery have been completed or until the eve of trial. But of course none of these are complaints made by Purple here.

According to Purple defendants' actions are analogous to those found in two cases and cited by the 10th Circuit as examples of improper manipulation of the judicial process. The first is Hooper vs. Advance America in the Eight Circuit, a 2009 decision. In Hooper the defendant moved to dismiss the complaint on several grounds and purported to reserve the right to enforce the applicable arbitration clause if the court denied its motion to dismiss. Only after the defendants' motion was denied did it move to stay the case and compel arbitration. Similarly in Khan vs. Parsons Global, a case from the DC Circuit in 2008, the defendant there responded to the complaint by filing a single motion to dismiss or alternatively for summary judgment or to compel arbitration. The District Court granted summary judgment, and the DC Circuit later reversed. Only on remand in the District Court after its summary judgment motion was unsuccessful did the defendant move to compel arbitration.

The defendants' persuasively argued that Hooper and

Khan are distinct from the circumstances in this case because, first, they deal with affirmative motions by defendants seeking substantive dispositive relief from the Court; and second, these defendants only invoked their rights to arbitration after their earlier requests for relief were denied. I agree with defendants that this case is distinct from both Hooper and Khan. It was Purple and not the defendants who sought relief from the court by filing a motion for TRO. Defendants' motion to compel arbitration was their first affirmative substantive request for relief in this case. I find the significant because it means defendants' motion was not an attempt to, in the language of the 10th Circuit again, take a Mulligan after an earlier request for relief progressed unfavorably.

Moreover, the [redacted] And the defendants raised the issue of arbitration multiple times before then suggesting that they were waiting for the expiration [redacted] This was described persuasively I thought in the reply in Paragraphs 14 through 17. Unlike Hooper and Khan where the parties were waiting to see how the case was going in court before deciding whether it would be better off there or in

arbitration, the defendants here were not taking a wait-and-see approach.

Similarly I'm not persuaded defendants' filing of Purple II was evidence of manipulating the judicial process as Purple suggests. Aside from its arguments discussed previously, Purple argues defendants filing Purple II was another attempt to, quote, see how litigation develops before invoking the right to arbitrate. That's language from Page 16 of the opposition.

But defendants' position was consistent from the outset, that Purple I was subject [redacted] Since defendants raised the issue of arbitration multiple times in Purple I prior to invoking the arbitration clause, I will not infer defendants were waiting on anything other than the expiration of the 60-day requirement required to do so.

Again, the facts here are not consistent with an inference that defendants were waiting to invoke the arbitration clause until they saw how Purple II would play out. Therefore, I conclude defendants did not waive their right to arbitrate by improperly manipulating the judicial process.

So after consideration of the Peterson factors and relevant guidance from the 10th Circuit on balance I find and conclude that defendants have not waived their right to

arbitrate. And that leaves us with another question to answer.

I'll now turn to the arbitrability of Purple's claims and Purple's counterclaims. Where the American Arbitration Association or AAA, triple A rules, have been incorporated into an agreement, arguments concerning the arbitrability of a dispute must be submitted to the arbitrator. This is language from Dish Network, LLC, vs. Ray, 10th Circuit 2018. Rule 7(a) of the AAA Commercial Arbitration Rule state, quote: The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim, end quote.

But a party cannot be required to submit to arbitration any dispute which it has not agreed to submit. That's a quote from Jacks vs. CMH Homes, 10th Circuit 2017. In their briefs the parties agreed that if the court orders arbitration it should do so for all claims in the consolidated action, which includes both Purple's claims and the defendants' counterclaims. This was discussed in the opposition at Page 20 and in the reply at Page 3 Footnote 2.

But during oral argument I asked the parties to submit supplemental brief about the applicability of the motion to compel arbitration to the claims against the

individual third-party defendants in Purple II [redacted] In its supplemental brief defendants appear to argue the claims against Purple should also be stayed pending arbitration.

Since Purple was [redacted] find that Purple's claims against the defendants and the defendants' claims against Purple must be submitted to arbitration with the arbitrator ruling on any objection relating to the claims against Purple.

With respect to the third-party defendants, Purple argues these individuals cannot be forced to arbitrate the claims against them because they are [redacted] This is in the supplemental brief from Purple at Page 3. And while there are circumstances where a non-signatory can be bound by an arbitration agreement Purple argues that those exceptions do not apply here. And I'll point to Inception Mining vs. Danzig, 311 F.Supp. 3rd 1265 from this district in 2018 discussing those exceptions.

Defendants do not address those exceptions beyond preserving their right to assert them and requesting the opportunity to brief them if I find such analysis is necessary to resolving the motion. This is in the defendants' supplemental response at Page 2 Footnote 1.

I find such analysis is unnecessary where as here

defendants also submit that the immediate issues can be resolved by a stay. Accordingly I conclude the third-party defendants [redacted]

This leaves one final issue to be resolved, what to do with the claims against the third-party defendants while the other claims are in arbitration. And when some claims are not arbitrable, the Court has inherent discretion to determine whether it should stay the entirety of the proceedings pending arbitration or stay only that portion of the proceeding that is arbitrable. That's a quote from Hill. Where the court went on to say: That the trial court must consider the maintenance of the combined efficiency of the public and private dispute resolution systems.

In their supplemental briefing -- in its supplemental briefing, rather, Purple argues that the court should allow the claims against the individuals to proceed in parallel with the arbitration of Purple's claims. Defendants disagree arguing that the claims against the individuals should be stayed pending resolution of the arbitration.

Given what I see is a substantial possibility if not a probability that the arbitration will resolve all of the claims at issue in the consolidated cases including those against the individual defendants I agree with the defendants and find that efficiency favors staying the claims against the

individual third-party defendants while the other claims are proceeding in arbitration.

For all of those reasons the defendants' motion is granted. The Court orders first, Purple's claims against defendants and defendants' claims against Purple must be [redacted] second, the remaining claims against third-party defendants Gary D. DiCammillo, Adam Gray, Joseph Megibow, Terry Pearce, Tony Pearce and the John Does be stayed pending resolution of the arbitration provisions -- or proceedings rather; and finally that the parties file a status report with the court no later than 14 days following a final decision or resolution of the arbitration proceedings.

Counsel, thank you for your patience during that lengthy ruling. Reserving whatever objections you may have are there any questions either of you have about that ruling?

Mr. Magleby?

MR. MAGLEBY: No questions from me, Your Honor.

THE COURT: Thank you. Mr. Fowler?

MR. FOWLER: No, Your Honor. I think that was very clear. Thank you.

THE COURT: All right. I appreciate again all of your patience. We'll be entering the docket text order or minute entry as I said referring to the transcript of this proceeding as the court's ruling and the basis for the ruling.

And we'll likely administratively close the case until we get further notice from you. But while it's administratively closed, of course, either of you are welcome to file or seek additional relief if it's appropriate in view of the court's ruling.

Again, thank you for your time and your patience. I wish you and your clients well in the upcoming arbitration.

Court will be in recess.

MR. MAGLEBY: Thank you, Your Honor.

MR. FOWLER: Thank you.

(Whereupon, the court proceedings were concluded.)

* * * * *

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, KELLY BROWN HICKEN, do hereby certify that I am a certified court reporter for the State of Utah;

That as such reporter, I attended the hearing of the foregoing matter on August 31, 2021, and thereat reported in Stenotype all of the testimony and proceedings had, and caused said notes to be transcribed into typewriting; and the foregoing pages number from 3 through 39 constitute a full, true and correct report of the same.

That I am not of kin to any of the parties and have no interest in the outcome of the matter;

And hereby set my hand and seal, this ____ day of _____ 2021.

_____
KELLY BROWN HICKEN, CSR, RPR, RMR